No. 92-97

In The

Supreme Court of the United States

October Term, 1993

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC., COMAIR, INC., MIDWAY AIRLINES (1987), INC., USAIR, INC., AMERICAN AIRLINES, INC., and UNITED AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD OF AERONAUTICS, and THE KENT COUNTY DEPARTMENT OF AERONAUTICS,

Respondents.

On Writ Of Certiorari
To the United States Court Of Appeals
For The Sixth Circuit

BRIEF OF ALL RESPONDENTS

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QUESTIONS PRESENTED

I. Whether the Anti-Head Tax Act regulates what airport owners charge airlines for their use of airfield and terminal facilities?

II. Whether the Anti-Head Tax Act provides the airlines with an implied right of action for direct judicial review of airport fees and charges even though Congress has provided in other federal aviation statutes that the Secretary of Transportation is to ensure that such airport charges are reasonable and nondiscriminatory?

III. Whether the Commerce Clause provides a basis for direct judicial review of airport charges when Congress has, by statute, set standards for such charges and established an administrative enforcement system?

IV. Whether the Anti-Head Tax Act or the Commerce Clause require airports to charge airlines less than the actual costs of providing the airfield and terminal facilities the airlines use, whenever an airport is able to collect surplus revenues from its concessionaires?

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STATEMENT OF THE CASE

I. FACTS

The Kent County International Airport in Grand Rapids, Michigan is owned by Kent County, Michigan (Kent County) and managed by the Kent County Board of Aeronautics and the Kent County Department of Aeronautics (Airport). Under Michigan law, Kent County is responsible for the maintenance, operation, and improvement of the Airport. Mich. Comp. Laws § 259.133 (1979) (Mich. Stat. Ann. § 10.233 (Callaghan 1991)).

The fundamental purpose of the Airport is to serve the air transportation needs of the regional community. In response to the local demand for airline services from the southwestern Michigan population and business base, Kent County built the Airport in 1963. Stipulation as to Airport History, Docket Item No. 139, ¶ 19, R. 784-85; J.A. 158-61, 184-86 and 192.

Historically, the funds for the construction, maintenance, operation, and improvement of Airport facilities have been derived from four sources: (1) local funds; (2) grants from the state or federal governments; (3) Airport charges to its aeronautical users, including the petitioner airlines (Airlines); and (4) Airport charges to nonaeronautical concession operators and to the public who use the nonaeronautical facilities. Stipulation as to Airport History, Docket Item No. 139, ¶¶ 12-19, R. 784-85; Pl. Ex. 6, J.A. 210 and 212-18.[1]

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[1] With reference to Rule 24.5 as to rulings on Exhibits, all Exhibits referred to in this Brief were admitted into evidence by a January 30, 1990 Stipulation (Docket Item 130), unless

The acquisition of land and construction of the Airport was financed by Kent County with financial assistance from federal and state funds. Kent County has spent over $5,500,000.00, and the state of Michigan more than $3,000,000.00, for construction and improvement of the Airport. J.A. 130; Pl. Ex. 6, J.A. 210 and 212-18. In addition, Kent County has allocated over $14,000,000.00 of available funds for improvements to roads that service the Airport. J.A. 128; Ex. DA-29, R. 796, 810.

As of the time of trial, the federal government had provided grants of more than $20,000,000.00 to the Airport. J.A. 210, 212, 213, 216-19 ("federal aid" column). In exchange for these federal grants, the Airport has given assurances, satisfactory to the Secretary of Transportation, that the Airport will be available "for public use on fair and reasonable terms and without unjust discrimination," that the Airport "will maintain a fee and rental structure . . . for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection," and that "all revenues generated by the airport . . . will be expended by it for the capital or operating costs of the airport [and] the local airport system." Ex. DA-35B at J.A. 302, 303 and 305, R. 644.

In addition to these contributions from the county, state and federal governments, the Airport itself has

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otherwise indicated. Reference to the District Court opinions in this case are to the pages of the Appendix attached to the Airlines' Petition for Certiorari.

spent millions of dollars on construction, maintenance, improvement and operation costs. *See*, Pl. Ex. 6, J.A. 193 *et seq.* and Pl. Ex. 20, J.A. 223, *et seq.* The Airport, as owner and landlord, recovers these costs from Airport users. Generally, airports use either a "compensatory" ("cost of service") or a "residual cost" methodology to determine the nature and amount of charges to aircraft operators that use airport facilities. Pet. App. 27a. The Airport in Kent County has always used a compensatory method, basing its charges to the Airlines on the Airport's actual "break-even" costs of providing specific aeronautical facilities for the Airlines' use. Pet. App. 27a.[2] Under the compensatory methodology the Airlines' only obligation is to pay for their own use of Airport facilities; they have no obligation to assume any part of any Airport deficit. Under the contrasting residual cost methodology, airlines specifically agree to cover any airport deficit (or residual costs) that may remain after an airport has collected its nonaeronautical revenues. Such "residual costs" can be more or less than the allocated costs of the aeronautical facilities used by the airlines. Pet. App. 27a.

For Airport rate-setting purposes, after netting out all funds received from the federal and state governments, the Airport allocates its total incurred costs among three primary, functional "cost centers": (1) an airfield with three runways, taxiways, and aprons for commercial

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[2] The compensatory "break-even" approach was designed by Airport consultant James Buckley, and is specifically described at J.A. 251-53. The general rate-making principles are succinctly set forth at J.A. 239-53 as part of the 1969 Airport rate study. J.A. 227-53. The full text of the disputed rate study is at J.A. 193-222.

aircraft parking; (2) a passenger terminal building used by the Airlines, by the visiting public, by passengers, by various concession operators, by other federal government agencies, and by the Airport staff; and (3) a public parking lot. Pet. App. 25-28a; J.A. 193-222. There are also additional secondary cost centers. The Airlines are charged only for their share of the actual costs of the airfield and terminal facilities they use at this Airport. Pet. App. 28a, 37a.

The Airport charges the Airlines a landing fee for their use of the airfield. The landing fee is determined by allocating to the Airlines their proportional share of the net local costs of the airfield, based upon the weight of their aircraft and the number of their operations at the Airport. The resulting landing fee (expressed as a rate of 70¢ per thousand pounds of aircraft weight) is then charged for each commercial aircraft landing. J.A. 193-222.[3]

The Airport charges the Airlines rent for their use of the passenger terminal. The net local costs of the Airport terminal are allocated to three types of space: prime space, non-prime air-conditioned space, and non-prime space without air conditioning. Pet. App. 28a. These net costs are then divided by the total amount of rentable space (by category) to yield annual terminal rental charges (expressed as a rate per square foot that ranged between $12 and $25). *Id.* The rent for each of the Airlines is then determined by the square footage of each type of

[3] The unscheduled general aviation flights do not pay a landing fee. Instead, there is a 4¢ per gallon "fuel flowage" fee charged on fuel sold to general aviation users. Pet. App. 27-29a.

space that each Airline chooses to occupy and use, plus a proportional allocation of the public space in the terminal. *Id.*

The Airport's concession operators (restaurant, gift shop, car rental agencies) do not use the airfield, and their operations do not affect the costs of building, maintaining, operating or improving the airfield. Therefore, the concessionaires are not charged any of the airfield costs. The concession operators do, however, share the passenger terminal with the Airlines, and they are allocated their share of the terminal space, plus a proportional share of terminal public space. J.A. 25-26.

The Airport does not use a compensatory method to determine its rates and charges for concession operators. Rather, the Airport bases its charges on the revenues of Airport concessions, which reflect local market conditions and consumer preferences. As a result, the Airport is able to generate revenues from concessions that exceed the costs allocated to them. As of December 31, 1989, the Airport had retained earnings or a surplus of $9,000,000.00 from Airport concessions. Pet App. 30a.

The Airport has assured the Secretary of Transportation, however, that all Airport revenues will be devoted to the maintenance and improvement of the Airport. Ex. DA-35B, J.A. 305-06. In 1990 the Airport projected that during the next decade it would spend as much as $40,000,000.00 on specific capital improvements qualifying for partial federal aid, including a major crosswind runway for commercial airline traffic. J.A. 108-10; Ex. DA-35A, R. 634, 636. Numerous additional capital projects not qualifying for partial federal aid are projected to

cost at least $11,000,000.00. Ex. DA-23, R. 774, J.A. 280-85; J.A. 118-26.

II. PROCEEDINGS BELOW

A. District Court Decisions

The Airlines claimed below that various Airport charges violated the Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513, the Airport and Airway Improvement Act (AAIA), 49 U.S.C. App. § 2210, the Commerce Clause and state law. The essence of the Airlines' claims was that the Airport's landing fee and terminal rental charges were excessive because they did not reflect concession revenues and that the landing fee was discriminatory because it was not collected from general aviation users.

The District Court rendered three opinions on the merits of the Airlines' claims. In denying the Airlines' summary judgment motion, the first District Court opinion held that the Airport's compensatory rate-making approach was not illegal *per se* as urged by the Airlines. Pet. App. 47a, *et seq.* After the decision in *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989), the Airport renewed its own summary judgment motion and also filed a motion to dismiss arguing, *inter alia*, that the Airlines had not exhausted their administrative remedies under the AAIA, that the Federal Aviation Administration (FAA) had primary jurisdiction, that there was no private cause of action under the AAIA, that the Airlines had not stated a cause of action under the AHTA, and that Commerce Clause review was inappropriate in light of the federal statutory scheme. Docket Items 98, 109, 120 and 121. The second opinion of

the District Court held that the Airlines had no private cause of action under the AAIA and that there was no need for Commerce Clause review, but also held that the Airlines had a private cause of action under the AHTA. Pet. App. 41a, *et seq.* After these two decisions the case proceeded to a two week non-jury trial in February of 1990.

On June 18, 1990, the District Court rendered its third and final opinion which, based on detailed findings of fact, held that the landing fees and terminal rental rates of the Airport were "reasonable" within the meaning of the AHTA. Initially, the Court noted that

> generally airports formulate rates and fees for airline tenants using either a compensatory or residual cost methodology. Compensatory methods base rates and fees on the actual cost of providing the particular facility and services used. Residual cost methods base the rates and fees on the total cost of operation of the airport. Pet. App. 27a.

Specifically, with regard to the Airport the Court found

> that since 1968 the KCAB [Airport] has used a compensatory methodology known as the Buckley Methodology. As used by the KCAB, the Buckley method attempts to assess user fees and rental rates only for plaintiffs' use of the facilities, services, and certain other allocable operating costs (overhead, maintenance and administration). Pet. App. 27a (footnote omitted).

After analyzing the charges imposed on the Airlines the Court concluded that "the Buckley Method is simply

a tool used to determine the break-even costs for the airlines' use of the Airport." Pet. App. 28a.

Turning from the facts to a legal analysis, the District Court initially held that "plaintiffs have the burden of proving that the rates and fees are unreasonable in light of the benefits conferred on plaintiffs." Pet. App. 30a. After reviewing the language of the AHTA the Court concluded that:

> Facially, nonairline concession revenues are not within the scope of the AHTA. Accordingly, the AHTA does not support the plaintiffs insofar as they seek to require the Airport to cross credit nonairline concession revenues to plaintiffs for purposes of establishing their rates and fees. Pet. App. 32a.

The Court further held that:

> The legislative history of the ADAA, of which the AHTA is a part, acknowledged that airports retained and used nonairline concession revenues that exceeded expenses. Congress contemplated that profitable airports would use such funds for local airport expansion and other capital projects. Pet App. 32a.

In addition to disagreeing with the holding in *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984), the District Court also distinguished *Indianapolis* on the ground that the Indianapolis airport had a monopoly on air travel in that region, whereas in the instant case, based on the proximity to the Lansing and Kalamazoo Airports, "the airport in Grand Rapids is not in a monopoly situation." Pet. App. 33-34a. The Court in *Indianapolis* had also based its decision on the fact that

it found that "the people who used the concessions at the Indianapolis airport are, with rare exceptions, airline passengers." 733 F.2d at 1267. The District Court here, as did the District Court in *City and County of Denver v. Continental Airlines*, 712 F. Supp. 834, 838-39 (D. Colo. 1989), found that concession users "include persons who are not air passengers" and that, in sharp contrast to the airside facilities whose use is mandatory by all air passengers, no air passenger is required to use Airport concessions. Pet. App. 35-36a.

Based on the evidence, the District Court held that "the plaintiffs were charged the break-even costs for the areas they use." The Court further found "that the Airport is charging plaintiffs only for their share of the operating expenses and is not generating any of its surplus revenues from rates and fees charged plaintiffs." Consequently, the Court held that "the Airport's charges to plaintiffs are reasonable in light of the benefits conferred on plaintiffs in exchange for the landing fees and terminal rental rates."[4] Pet. App. 37a.

The Court also rejected the Airlines' argument that they were being discriminated against since general aviation was not charged the full allocated costs of the airfield. The Court held that the Airlines paid no part of the shortfall, but rather the

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[4] The Court did find that a portion of the overnight parking fee charged to the Airlines was unreasonable since the evidence established that the charge exceeded the costs allocated to overnight aircraft parking. The Airport did not appeal this finding. Thus, the decision of the District Court is final as to this issue.

> shortfall from general aviation users is covered by charges to concessionaires and other non-airline users of the Airport. Therefore, plaintiffs' argument must fail. Pet. App. 38a.

Finally, the District Court commented on the Airport surplus in the following manner:

> In conclusion, the Court holds that the AHTA does not require defendants to cross credit non-airline revenues when establishing rates to be charged airlines. Although the Court is troubled by such large surpluses generated by the Airport, it must acknowledge the prudent management which allows the Airport to run efficiently and with foresight thereby avoiding the necessity of seeking extra tax or bond revenues from the citizens of Kent County for expansion or improvement. Pet. App. 39a.

B. Sixth Circuit Court of Appeals Opinion

The Airlines appealed to the Court of Appeals for the Sixth Circuit which, on February 3, 1992, affirmed in all respects the District Court's decision except for the allocation of 100% of the crash/fire/rescue (CFR) costs to the Airlines.[5] More specifically, the Court of Appeals held:

> We AFFIRM the District Court's dismissal of the Airlines' claims under the Airport and Airway Improvement Act of 1982 and the Commerce Clause, its finding that the Airlines have no

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[5] The Sixth Circuit Court of Appeals Opinion is reprinted at J.A. 15-36. The Airport did not file a Cross Petition for Certiorari. Therefore, the CFR issue is not before this Court.

> right to be cross-credited for concession revenues, the finding that the allocation of terminal rental fees between the Airlines and concessions were reasonable, and the finding that the method the airport used to assess airside operation fees for general aviation and the Airlines was reasonable. J.A. 16.

The Court noted that

> [t]he accounting methodology used by the Airport views the Airport as the landlord, and all users as tenants. This accounting system, developed by James C. Buckley, is known as the Buckley or compensatory "methodology" and is widely used by airports. The system is designed so that the Airlines are only charged for the land costs, physical facilities and other expenses which can be directly allocated to them. J.A. 17 (footnote omitted).

The Court of Appeals specifically agreed with the District Court holding that the Airlines do not have a private right of action under the AAIA but have a private right of action under the AHTA. The Court further found, however, that "the Airlines have no standing to assert the claims of the non-airline airport users or passengers." J.A. 22.

Turning to the AHTA, the Court of Appeals noted that although the statute requires airport charges to airlines to be reasonable, "[t]he statute does not provide guidance for determining what constitutes a reasonable fee." J.A. 22. The Court of Appeals further found that the Airlines had "the burden of proving that the rates are unreasonable" and that deference should be given to

airports "as long as they act within a broad range of reasonableness." J.A. 22-23.

The Court succinctly rejected the Airlines' claim to the benefit of concession fees, holding that "[n]on-airline concessions are not within the scope of the AHTA." J.A. 23. The Court also distinguished *Indianapolis* on the grounds that the Airport, unlike Indianapolis, does not have a monopoly on air service in its area. The Court of Appeals, like the District Court, also found persuasive the reasoning by the court in *Denver* that concession users "include persons who are not air passengers [and that no passenger using the airport] is required to park in the parking lot, rent a car, eat at a restaurant, or buy a magazine." J.A. 24 (quoting *Denver*, 712 F. Supp. at 838-39).

The Court of Appeals therefore found the landing fee to be reasonable (except for a portion of the CFR charge) and further determined that the allocation of the costs of the passenger terminal building to the airlines and to concessions based on floor space occupancy and a proportional amount of the public space was reasonable. J.A. 25-26.

The Court of Appeals, by a 2-1 vote, also rejected the Airlines' arguments about general aviation, holding that:

> Since the shortfall in the costs incurred by General Aviation does not come out of the Airlines' pocket, but is made up instead out of concession revenues, this court has no authority to order that General Aviation must be charged 100% of its airside operation costs. J.A. 32.

The Court of Appeals pointed out that

> even if General Aviation were charged 100% of its airside operation costs, the Airport reasonably could continue to charge the Airlines 100% of the airside operation costs. J.A. 33.

The Court of Appeals also found that since

> the airlines are not entitled to a cross-credit of concession revenues . . . the airlines do not have standing to challenge what is done . . . in regard to General Aviation. J.A. 34.

Finally, the Court of Appeals held that the District Court correctly relied on this Court's decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), when dismissing the Airlines' Commerce Clause claims, since under the AAIA "Congress has established clear guidelines for the fees and rates which may be charged commercial airlines and other public airport users[,]" noting that where Congress has regulated fees, the only issue is "the consistency between the fees and Congressional policy." J.A. 31.

SUMMARY OF ARGUMENT

By its express terms, the Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513, does not regulate or proscribe the Airport's landing fees and terminal rental charges which the Airlines challenge. Rather, § 1513(a) delineates narrow categories of forbidden fees and charges affixed on airline travelers on a direct or indirect *per capita* basis. Lest the prohibition be more broadly read, Congress in § 1513(b) explicitly decreed that the AHTA does not

prohibit the Airport from levying and collecting "reasonable rental charges, landing fees and other service charges from aircraft operators for the use of airport facilities." The lower courts' decisions that the AHTA provided a legal basis to challenge the compensatory fees charged by the Airport for landing aircraft and for rental of terminal space are inconsistent with the express terms of the statute.

Furthermore, even if the AHTA provided a substantive standard for review of the Airport's charges for the Airlines' use of airport facilities, no private right of action may be implied for direct judicial review. Under this Court's traditional test, no Congressional intent can be gleaned to permit the Airlines to sue to challenge airport fees and charges under the AHTA. To the contrary, direct judicial review undermines the intricate administrative and regulatory system under which the Secretary of Transportation has been entrusted to apply agency expertise to the determination of whether airport fees and charges are reasonable and nondiscriminatory. To allow litigants to bypass the agency review of complaints about airport fees not only ignores the series of federal statutes – beginning with the Federal Airport Act of 1946 (May 13, 1946, ch. 251, § 11, 60 Stat. 176 (1946)) and continuing through the Airport and Airway Improvement Act of 1982 (Pub. L. No. 97-248, 96 Stat. 686 (1982)) – which order the Secretary to ensure that airports make their facilities available on reasonable terms in a nondiscriminatory fashion, but also runs the serious risk of inconsistent determinations by the administrative agency and the courts regarding the reasonableness of airport fees.

This pervasive Congressional action, in balancing the economic needs of local airport proprietors with the importance of encouraging interstate travel of goods and passengers, precludes judicial review under a dormant Commerce Clause analysis. U.S. Const. art. I, § 8, cl. 3. Congress having made the political judgments regarding this balance, the courts must be reluctant to upset the federal framework under the banner of a constitutional claim that an airport cannot recoup its costs of providing facilities for air carriers operating in interstate commerce.

In essence the Airlines ask the Court to outlaw compensatory rate-making, in which the Airlines are charged on a cost basis for the facilities they use, and instead to mandate residual cost rate-making in which the Airlines share in concession revenues as if they were investors in the Airport. But the Airlines contributed neither capital nor management to the Airport. Nonetheless, the Airlines urge that the courts adopt the role of a rate-making commission to compensate the Airlines for the benefits they allegedly confer on the Airport. Aside from the economic mischief and total lack of standards inherent in such a request, the Airlines' plea must be denied on the principled basis that fees derived on a compensatory cost-based system violate no federal statute or constitutional provision.

Even were the Court to review the Airlines' claims on the merits here, it should respect the detailed fact finding of the District Court which, following a full trial, reviewed the evidence and found that the compensatory system is proper and that the Airlines were charged only the "break-even" costs of the facilities which the Airlines use. This determination, reviewable only under the

"clearly erroneous" standard, should not be set aside. Since the Airport's compensatory fees and charges are reasonable, the Airlines' challenge, whether reviewed under the AHTA or the Commerce Clause, fails since both the statute and the Constitution permit reasonable, nondiscriminatory, cost-based charges to be assessed on the users of a local government's airport facilities.

ARGUMENT

I. THE ANTI-HEAD TAX ACT DOES NOT REGULATE THE AIRPORT FEES AND CHARGES CHALLENGED BY THE AIRLINES

The Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513,[6] provides in subsection (a) that

> no State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. . . .

Subsection (a) is the *only* prohibitory provision of the AHTA. To confirm the limited scope of the AHTA's prohibitions, subsection (b) provides that:

> . . . nothing in this section shall prohibit a State (or political subdivision thereof. . . .) from the

[6] The AHTA was enacted in 1973. Pub. L. No. 93-44, 87 Stat. 90 (1973).

> levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or service; and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting *reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities* (emphasis added).

Thus, § 1513(a) sets forth the types of taxes and charges which states and their subdivisions are prohibited from imposing on air commerce, while § 1513(b) sets forth the types of taxes and charges which they are *not* prohibited from imposing. In *Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 n.6 (1983), this Court, in a unanimous opinion striking down a state gross income tax on airlines under § 1513(a), noted that § 1513(b) "clarifies Congress' view that the States are still free to impose on airlines and air carriers 'taxes other than those enumerated in subsection (a). . . . ' "[7]

Given the plain terms of the AHTA, when a charge upon air commerce is challenged under this statute, the threshold inquiry is whether the particular charge is prohibited by § 1513(a). If the charge is not prohibited by subsection (a), the inquiry must end and the challenge must be rejected.

Section 1513(a) only prohibits specified forms of state taxation of air commerce. The Airport's landing fees and

[7] As the Airlines acknowledge, "certain fees [were] specifically exempted from statutory regulation" under the AHTA. Airlines' Brief, p. 13.

terminal rental charges now before the Court are neither taxes levied directly or indirectly upon persons (or the carriage of persons) in air commerce, nor taxes upon the sale of (or receipts from) air commerce of the sort prohibited by § 1513(a). Subsection (a) thus does not purport to prohibit the challenged charges the Airport levies upon the Airlines for their use of airport facilities. Consequently, the Airlines' statutory challenge must fail.

This Court has never before considered whether the AHTA regulates landing fees or terminal charges. The Secretary of Transportation, who is ultimately responsible for the administration and enforcement of the federal aviation laws, however, has held that the AHTA only prohibits charges upon air commerce that are "in form or substance a head tax or its equivalent," and, therefore, does not regulate landing fees. *Investigation Into Massport's Landing Fees*, FAA Docket 13-88-2. On appeal, the United States Court of Appeals for the First Circuit affirmed the Secretary's ruling. With proper deference to the Secretary's interpretation of the AHTA,[8] the Court of Appeals held that

> [the airport's] actions in enacting [the challenged landing fees] are outside the scope of § 1513, as not being a head tax or its equivalent. The landing fee is clearly not a "charge . . . on persons traveling in air commerce," nor is it a levy "on the carriage of persons" so traveling, "on the sale of air transportation," or "on the gross receipts derived therefrom."

[8] The Secretary's interpretation of the AHTA is entitled to substantial deference. *See, e.g., Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

New England Legal Foundation v. Massachusetts Port Auth., 883 F.2d 157, 170 (1st Cir. 1989).[9]

This Court should adopt the interpretation of the AHTA given by the Secretary of Transportation and by the First Circuit in *New England Legal Foundation* because it is consistent with the plain terms of the Act and with the Act's legislative history. The AHTA was enacted by Congress in 1973 as a direct response to this Court's decision in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). *Evansville* rejected a Commerce Clause challenge to airport head taxes (that is, taxes charged upon a per-passenger basis). 405 U.S. at 711, 720. As this Court noted in *Aloha Airlines*, in the wake of *Evansville*, Congress was concerned that a proliferation of local taxes would burden interstate commerce and impose double taxation on air travelers, when coupled with the separate federal tax that is levied upon each passenger's ticket. 464 U.S. at 9-10. In order to prevent this result, Congress enacted the AHTA.

Neither the language nor the legislative history of the AHTA suggest in any way that Congress intended through the AHTA to restrict in a new way the charges that airport operators levy upon aircraft operators for the use of airport facilities. The most sensible interpretation of § 1513(b) is that Congress wished to maintain and

[9] The Court of Appeals also affirmed the Secretary's decision that Massport's landing fees were unreasonable and therefore unlawful under 49 U.S.C. App. § 2210(a)(1) and, as a result, also unlawful under 49 U.S.C. App. §§ 1305 and 1348. 883 F.2d at 168-170, 173-175. The Airlines never cited or discussed this case before this Court.

preserve, and not to duplicate or displace, the existing federal regulation of airport charges.

As early as in the Federal Airport Act of 1946 Congress directed the Civil Aeronautics Administrator to obtain an assurance, before approving the grant of federal funds to an airport, that "the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination."[10] May 13, 1946, ch. 251, § 11, 60 Stat. 176 (1946), formerly codified as 49 U.S.C. § 1110(1). The Airport and Airway Development Act of 1970 (AADA), which greatly increased the scope of federal funding for airport development, reiterated this requirement. Pub. L. No. 91-258, Tit. I, § 18, 84 Stat. 229 (1970), formerly codified as 49 U.S.C. § 1718(1). The 1970 Act also added the requirement that the airport agree "to maintain a fee and rental structure for the facilities and services provided to airport users that would make the airport as self-sustaining as possible under the circumstances existing at that particular airport." Pub. L. No. 91-258, Tit. I, § 18, 84 Stat. 229 (1970), formerly 49 U.S.C. § 1718(8).

Consequently, there was no reason for Congress to enact the AHTA to regulate the reasonableness of airport aeronautical user charges because the federal aviation laws already had long required that they be reasonable and nondiscriminatory, and had delegated to the Secretary of Transportation (or predecessor) the responsibility

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[10] Virtually all of the airports in the United States serving commercial airlines receive federal funds for development projects. Brief for the United States as *Amicus Curiae* in Opposition to Petition for Certiorari, p. 15, n.11.

to enforce these requirements. In fact, since enactment of the AHTA in 1973, Congress has reconfirmed these requirements in the Airport and Airway Improvement Act of 1982 (AAIA), Pub. L. No. 97-248, Title V, § 511, 96 Stat. 686 (1982), 49 U.S.C. App. § 2210(a)(1) and (a)(9).

Both before and after the passage of the AHTA, Congress has consistently imposed in separate laws the requirements that an airport receiving federal funds give assurances satisfactory to the Secretary that the airport will be available "for public use on fair and reasonable terms and without unjust discrimination" and that it will maintain a fee and rental structure making the airport "as self-sustaining as possible." *Id.* These enactments confirm that it is not under the AHTA, but rather through federal grant assurances, that Congress intended to regulate the reasonableness of charges upon air commerce for the use of airport facilities.

Accordingly, this Court should affirm the Court of Appeals decision rejecting the Airlines' challenge to the Airport's landing fees and terminal rental charges on the ground that the AHTA only restricts the imposition of "head taxes" and their equivalents and does not provide any basis for the direct judicial review of the Airport's aeronautical user fees.

II. THE ANTI-HEAD TAX ACT PROVIDES NO PRIVATE RIGHT OF ACTION TO THE AIRLINES TO CHALLENGE AIRPORT USER FEES[11]

Even if the Court determines that the AHTA was intended to regulate the reasonableness of Airport aeronautical user fees, the statute provides no basis for direct *judicial* review of their reasonableness. The AHTA does not by its own terms create a private right of action for the Airlines, and as this Court has noted, "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross & Co. v. Redington*, 442 U.S. 565, 571 (1979). In this case the Court should decline to imply a private right of action under the AHTA because there is no evidence that Congress intended to give a right of action to the Airlines to challenge airport user fees. Moreover, the Airlines have an adequate *administrative* remedy, and a simultaneous

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[11] The Airport, alternatively, defends the judgment appealed from on the basis that the Airlines have no private right of action under AHTA. *See*, Reply of the Airport Respondents in Support of Motion of the United States for Leave to Participate in Oral Argument and for Divided Argument filed September 10, 1993. It is well established that a party may defend a judgment "on any ground that the law and the record permit that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). A holding by this Court that no private right of action exists under the AHTA would provide an alternate ground to affirm the Court of Appeals' dismissal of the Airlines' AHTA challenge to the Airport's landing fees and terminal rental charges. *See also, United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63 (1956) (Court should decide issue regarding the maintenance of a proper relationship between the courts and the agency in matters affecting transportation policy).

judicial remedy would undermine and confuse the regulatory structure Congress has created.

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), this Court set forth the criteria to be used to determine whether Congress meant to create a private right of action when it enacted a statute that, like the AHTA, is silent on the subject. The *Cort* test presents a series of questions: First, are the Airlines "one of the class for whose *especial* benefit the statute was enacted" – that is, does the statute create a federal right in favor of the Airlines? Second, is there any indication of legislative intent, explicit or implicit, either to create such an Airline remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the Airlines? Fourth, is this an area relegated to state law? *Id.* at 78. Application of these criteria confirms that the Airlines have no private right of action to challenge the Airport's landing fees and terminal rental charges under the AHTA.

First, the language of the statute taken as a whole does not suggest that airlines were singled out for special benefit under the AHTA, particularly with respect to charges by airport operators for their use of airport facilities. Rather, the statute suggests that Congress sought to benefit the public at large, not air carriers in particular. Furthermore, even if the Airlines had an implied right of action under the prohibitory terms of § 1513(a) to challenge "head taxes" (or their equivalents) when they are levied by governmental entities which are *not* subject to regulation by the Secretary of Transportation, there is no indication that Congress sought to provide special protection to air carriers by referring in the permissive terms of

§ 1513(b) to "reasonable" airport user charges levied by airport operators that were already subject to regulation under the federal aviation laws.[12]

Second, there is no legislative history suggesting an intent to create a private right of action for air carriers to challenge airport user fees. S. Rep. No. 12, 93d Cong., 1st Sess. at 17-26 (1973); H.R. Conf. Rep. No. 225, 93d Cong., 1st Sess. at 5-6 (1973).

Third, a private right of action to challenge the reasonableness of airport landing fees and terminal rental charges levied by airport operators would be inconsistent with the overall federal legislative scheme for the uniform regulation of air commerce. The Secretary of Transportation (or predecessor) has been authorized by the Federal Aviation Act of 1958, as amended, to conduct investigations, issue orders and promulgate regulations to carry out the provisions of the Act, subject to exclusive review in the Court of Appeals. 49 U.S.C. §§ 1354(a)-(c), 1482(a) and 1486(a); *see*, 14 C.F.R. Pt. 13 (1993). The AHTA was enacted in 1973 as an amendment to the Federal Aviation Act and these administrative procedures have

[12] The scope of a private right of action under § 1513(a) to challenge airport charges that are specifically prohibited by the AHTA is not an issue here. That is, even if airlines have a right of action to challenge state taxation of their gross income, as they did in *Aloha Airlines*, 464 U.S. at 7, or "head taxes" levied upon their passengers, as they did in *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 15-16 (1st Cir. 1987), this does not mean that they have a right of action under the AHTA to challenge charges for the use of airport facilities that are mentioned only in the permissive provisions of § 1513(b) and are regulated administratively under § 2210.

always been available to enforce its requirements. More importantly, both before and after the AHTA was enacted, the Secretary of Transportation (or predecessor) has been directed to obtain assurances that airports have made their facilities available on "reasonable terms without unjust discrimination." 49 U.S.C. App. § 2210(a)(1). An aggrieved party may file a complaint with the Secretary, who can review the reasonableness of the challenged charges, subject ultimately to judicial review. 49 U.S.C. App. § 2218.

In recognition of this "administrative enforcement scheme," the Sixth Circuit correctly rejected the Airlines' claim to a private right of action under § 2210, a ruling not appealed by the Airlines. J.A. 24. Implying a private right of action under the AHTA to challenge Airport user fees which are subject to regulation under § 2210 would create the potential for conflict between the courts and the Secretary about how the "reasonableness" of charges upon aircraft operators for the use of airport facilities is to be determined. This undesirable result occurred in the confusing, parallel judicial and administrative proceedings that culminated in the First Circuit's decision in *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 158-59 (1st Cir. 1989), which unravelled a tangled web of conflicting rulings by the District Court and by the Secretary.[13] In view of the long history of

[13] The District Court, which recognized a private right of action under AHTA found Massport's landing fees to be reasonable, but the Secretary found them to be unreasonable under § 2210 on essentially the same record. 883 F.2d at 166-67. The Court of Appeals ruled that the Secretary's decision was controlling. 883 F.2d at 173. This case demonstrates the willingness and ability of the Secretary to enforce the "reasonableness" requirements of the AAIA.

delegating responsibility to the Secretary of Transportation (or predecessor) to use expertise to insure that airport charges are "reasonable and not unjustly discriminatory," it is highly doubtful that Congress meant (without expressly saying so) to provide for direct judicial review of the reasonableness of airport landing fees and terminal rental charges when it enacted the AHTA in 1973.

The fourth *Cort* test – whether the matter has been relegated to state law – does not assist the Airlines in their efforts to imply a private cause of action under AHTA. The Michigan statute requires that airport fees be reasonable and nondiscriminatory. Mich. Comp. Laws § 259.133 (1979) (Mich. Stat. Ann. § 10.233 (Callaghan 1991)).

In short, this Court should now hold that the AHTA provides no private right of action for the Airlines to seek judicial review of the Airport's landing fees and terminal rental charges. To hold otherwise would be inconsistent with the plain language of the AHTA, unsupported by any of its legislative history, and incompatible with the orderly and uniform administration of federal aviation policy by the Secretary of Transportation. Accordingly, on this alternate basis, this Court should affirm the judgment of the Court of Appeals rejecting the Airlines' claims under the AHTA.

III. THERE IS NO BASIS FOR REVIEWING THE AIRPORT'S FEES AND CHARGES UNDER THE COMMERCE CLAUSE

The Airlines argue that the Airport's charges should be reviewed under the Commerce Clause because it "has

long been understood to embody a negative prohibition against State action that unreasonably burdens interstate commerce." Airlines' Brief, p. 40. The Court of Appeals correctly rejected this claim on the ground that when Congress acts to regulate interstate commerce, dormant Commerce Clause analysis is not appropriate, and the only question is whether the statutory requirements imposed by Congress have been met. J.A. 30-31.[14] The Airlines claim that because this Court considered the constitutionality of head taxes in *Evansville*, the Court of Appeals erred when it failed "even to *consider* such a claim here." Airlines' Brief, p. 40 (original emphasis). This argument, however, completely misses the point of this Court's Commerce Clause jurisprudence.

As held by this Court, the judiciary will engage in dormant Commerce Clause review "only . . . when Congress has not acted or purported to act. . . . When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional

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[14] In rejecting the Airlines' claims under the Commerce Clause, the Sixth Circuit aligned itself with the two previous Court of Appeals decisions on this question. *See, Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262, 1266-67 (7th Cir. 1984) (refusing to consider Commerce Clause challenges to airport rates and charges after enactment of the AHTA); *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 174, 176 (1st Cir. 1989) (holding AHTA inapplicable to challenged landing fees, but nevertheless refusing to consider Commerce Clause claims based on the "reasonableness" requirements of AAIA).

action." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982) (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-27, 431 (1946)).

In the aviation arena Congress *has* acted by authorizing airport operators to impose reasonable charges for the use of airport facilities, and, therefore, the dormant Commerce Clause approach is not applicable. First, in the AAIA's grant assurance provisions, Congress has specifically required that airports assure in ways that are "satisfactory to the Secretary" that their landing fees and terminal charges are "fair and reasonable" and that there is no "unjust discrimination." 49 U.S.C. App. § 2210(a)(1).[15] Second, in the AHTA, Congress addressed "the issue of 'State taxation of air commerce,' detailing in § [1513](a) the kinds of taxes which are prohibited and in § [1513](b) those which are permissible." *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1, 6-7 (1986); *accord*, *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 n.6 (1983) (holding that in § 1513, Congress has

[15] For this reason, this case does not present the Commerce Clause question the Airlines frame: "[w]hether the Commerce Clause is automatically rendered inapplicable to an area of commerce whenever the Congress takes any action at all to regulate that area." Airlines' Brief, p. i. The Commerce Clause question this case presents is whether judicial review under the Commerce Clause can be invoked when Congress has extensively occupied the field by prohibiting head taxes, by permitting reasonable and nondiscriminatory airport user fees, and by creating an extensive federal administrative mechanism to ensure the reasonableness of airport charges. Both lower courts correctly held that the Commerce Clause is not implicated in these circumstances.

chosen to make a distinction that "the courts are obliged to honor").[16]

In such circumstances, when Congress has acted, the challenged fees are "invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985) (because 12 U.S.C. § 1842(d) permits a bank holding company to acquire a bank located in another state only if that state permits such an out-of-state acquisition; thus, state regulation of such acquisitions is no longer subject to Commerce Clause challenge). *See also, Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421 (1946) (a state tax is no longer subject to Commerce Clause challenge once Congress has "taken affirmative action consenting to it or purporting to give it validity.")

As this Court has said, "[i]t would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply

[16] The Airlines argue that § 1513(b) is a "savings clause" of the sort that does not preclude review under the dormant Commerce Clause analysis, citing *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982), and *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982). Airlines' Brief, p. 40. The thrust of *Sporhase* and *New England Power*, however, was that Congress had not otherwise spoken to the lawfulness of the state action covered by the savings clauses, so if review under the Commerce Clause were unavailable, there would be no federal protection whatsoever. Here, in contrast, when Congress enacted § 1513(b) to provide that the AHTA did not prohibit "reasonable" airport user charges, it had already acted to regulate the reasonableness of such charges in its grant assurance statutes. Accordingly, the Airlines' reliance upon the *Sporhase* line of authority is misplaced.

it in such a way as to *reverse* the policy that the Federal Government has elected to follow." *Wardair*, 477 U.S. at 12 (original emphasis). In *Wardair*, Chief Justice Burger summed up the situation exactly: "the plain language of § 1513(b) demonstrates . . . that there is *nothing* 'dormant' here." *Id.* at 14 (concurring).[17]

Because the "reasonableness" of an airport's landing fees and terminal rental charges is regulated by federal statute, either under the AHTA as contended by Airlines or under the AAIA as believed by the Airport, they cannot be subjected to review under the dormant Commerce Clause. If the charges meet the statutory "reasonableness" requirements Congress has imposed, as the Airport's do, it makes no sense for a court to find them to be "unreasonable" under the dormant Commerce Clause.[18] Accordingly, this Court should affirm the judgment dismissing the Airlines' claims under the Commerce Clause.

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[17] In its brief as *amicus curiae* (p. 10 n.6), the American Trucking Association asserts that Chief Justice Burger "did not persuade a single colleague to join his concurring view that Section 1513(b) displaced Commerce Clause analysis." It is true that in the arena of *foreign* commerce, the Chief Justice alone found § 1513(b) to be dispositive. The rest of the members of the Court were uncertain about the application of the AHTA to foreign commerce. 477 U.S. at 6-7. They were not uncertain, however, that in § 1513(b) Congress had exercised its authority in interstate commerce and had unequivocally permitted states to impose in domestic *interstate* commerce the various charges described in § 1513(b). *Id.* at 7.

[18] The illogic of such a result is accentuated by the fact that the Airlines would apply the *same* measure of reasonableness under the AHTA and under the Commerce Clause: the test articulated by the Court in *Evansville*. Airlines' Brief, p. 22. *See*, Pt. IV.A., below.

IV. THE AIRPORT'S FEES AND CHARGES TO THE AIRLINES ARE "REASONABLE" AS A MATTER OF FEDERAL LAW

Even if the Court determines, contrary to the above Points I, II and III, that the AHTA regulates the reasonableness of airport user charges and the Airlines have a private right of action under the AHTA or under the Commerce Clause to direct judicial review of the "reasonableness" of the challenged Airport charges, the Court should affirm the decision of the Court of Appeals because it is evident from the trial record that the challenged Airport charges are "reasonable."

Before this Court, the Airlines only challenge two Airport charges: landing fees, which are charged for their use of the airfield; and terminal rents, which are charged for their use of the passenger terminal building. As the District Court found, however, these two charges are based upon the "break even" cost to the Airport of providing these facilities to the Airlines and reflect the actual use they make of the airfield and passenger terminal. Pet. App. 28a and 37a. Significantly, neither this Court, nor Congress, nor the Secretary of Transportation, has ever given any indication that it is unreasonable for an airport to recover from aircraft operators the "break-even" costs of providing them with airport facilities so long as the charges are based upon rational measures of their relative use and are otherwise nondiscriminatory.

Section 1513(b) of the AHTA speaks to "reasonable" charges to "aircraft operators for the use of airport facilities." The AHTA, however, does not define the term

"reasonable," and nothing in the language or legislative history of the AHTA suggests that the term "reasonable" should have any unique interpretation. Consequently, all parties agree that the applicable "reasonableness" standard under the AHTA is the same as the three part test under the Commerce Clause articulated by this Court in *Evansville*. First the charges must be based on some "fair approximation of use"; second, the charge must not be "excessive in comparison with the governmental benefit conferred"; and third, the charge must not be "discriminatory against interstate commerce." 405 U.S. at 716-17. At trial, both the Airlines and the Airport directed their evidence to this standard, which was applied by both the District Court and the Court of Appeals, when holding the Airport's charges to be reasonable under the AHTA. Before this Court, the Airlines offer no alternative measure of "reasonableness" and once again structure their argument around the *Evansville* standard. Airlines' Brief, pp. 20-23. Because it is evident that the Airport's charges to the Airlines satisfy the *Evansville* "reasonableness" test, the Sixth Circuit's decision should be affirmed on the merits, even if the Court believes direct judicial review of Airport charges is appropriate.

A. Federal Law Permits the Use of Compensatory Rate-Making Methods

As the District Court found, airports commonly use either "compensatory" or "residual cost" methods to determine what to charge aircraft operators for the use of airport facilities. Pet. App. 27a. Here the Airport has consistently chosen to use a compensatory method and

therefore bases its charges to the Airlines on the actual costs of providing them with the airport facilities they use.[19] Both the District Court and the Court of Appeals correctly concluded that the Airport's use of the compensatory method was not unlawful *per se*. Pet. App. 56-57a; J.A. 24-25. The Airlines' claim that the AHTA and the Commerce Clause prohibit the use of compensatory methods or require use of residual cost methods is unprecedented and without merit. Nothing in the AHTA or in the Commerce Clause prevents the owner of an airport from using a compensatory rate-making method to recover from airlines the actual costs of providing the airport facilities used by them. No federal statute and no precedent of this Court requires local governments to charge users less than actual costs. This Court's precedents confirm that the Commerce Clause does not dictate the choice of methods used to determine how a state charges for the use of facilities in commerce. As this Court said in *Hendrick v. Maryland*, 235 U.S. 610, 624 (1915):

> [W]here a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of those charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical

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[19] Residual and compensatory methodologies are discussed at page 3 hereof. *See also*, the Congressional Budget Office study, "Financing U.S. Airports in the 1980's" (April, 1984), at Chapter II (pp. 18-19), which summarizes the difference between the two methods.

standard, they constitute no burden on interstate commerce.

And as made clear by this Court in *Evansville*, there is under federal law no rigid formula or specific method for the proper recovery of airport costs:

> At least so long as the toll [charge] is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users. 405 U.S. at 716-17.

The state is not required "to compute with mathematical precision" its costs of serving interstate commerce; if its charges "do not appear to be manifestly disproportionate to the services rendered, we cannot say from our knowledge or experience that they are excessive." *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939).

The use of compensatory rate-making is fully consistent with the essence of the *Evansville* standard that aircraft operators pay their fair share of the costs for the use of airport facilities. It is also fully consistent with the policy of the Secretary of Transportation, who is responsible for administering the federal aviation laws, that "airports are given wide latitude in selecting a particular rate methodology and fee structure. [A]s long as the charges to air carriers do not result in revenues that exceed by more than a reasonable margin an airport's costs in servicing those carriers." Brief of the United States as *Amicus*

Curiae on the Petition for Certiorari, p. 8. Accordingly, as both courts below have concluded, the use of a compensatory rate-making method by the Airport is not illegal *per se*.

B. The Airport's Landing Fees and Terminal Rental Charges Do Not Violate the AHTA or the Commerce Clause

1. The District Court Found the Airport Charges to be Reasonable

Because the use of compensatory rate-making methods is not illegal *per se* the Airlines could only have succeeded if they had proved at trial that, *as applied*, the Airport's compensatory method produced unreasonable landing fees and terminal rental charges. The fact is, the opposite is true. As the trier of fact, the District Court rejected the economic theory advanced by the Airlines and, instead, found that, with one exception,[20] the Airlines were charged the "break-even" cost for the areas which the Airlines utilized at the Airport, both airside and in the terminal area. Pet. App. 37a. Since by definition a "break-even" charge is reasonable, the Airlines' challenge to landing fees and terminal rental charges must be rejected. Indeed, the District Court expressly found

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[20] This "exception" was the aircraft parking fee. The Airport did not appeal from the disallowance of the amount of this fee and that issue is not before this Court.

> that the Airport's charges to plaintiffs are *reasonable* in light of the benefits conferred on plaintiffs in exchange for the landing fees and terminal rental rates. *Id.* (emphasis added).

This finding is dispositive.

The District Court's critical finding that the charges are "reasonable" may not be set aside unless "clearly erroneous." Fed.R.Civ.P. 52(a). *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). District Court rulings have been upheld under the "clearly erroneous" standard in a wide variety of cases, 5A Moore's Federal Practice ¶ 52.03[1] (1993), including disputes regarding accounting, leases, and determination of "reasonable" recoveries under a *quantum meruit* theory. *Id.* at n.19.

Since the Airlines cannot challenge the "break-even" cost finding of the trial court,[21] the Airlines argue that even if *they* have only been charged the break-even costs for their own use of the airfield and terminal, the Airport's charges to the Airlines are nevertheless unlawful

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[21] Rearguing the evidence, the Airlines do attempt to claim that the Airport's charges go beyond cost recovery because, they say, the Airport has imposed "mythical 'carrying charges' " on its capital improvements that make its charges unreasonable. Airlines' Brief, pp. 34-36. This claim, however, was before the District Court who nevertheless found that the Airport only recovers its "break-even" costs from the Airlines. Pet. App. 28a. The Court of Appeals affirmed, and in a ruling ignored by the Airlines, the Court of Appeals specifically found that the use of an 8% imputed interest rate to establish the carrying charges was "reasonable and should not result in a net present value which exceeds the initial cost of the project." J.A. 29.

because the charges to general aviation users are too low and the Airport derives a surplus from concession revenues. Neither contention can withstand analysis.

2. The Lower Courts' Rulings on General Aviation were Proper

The Airlines argue that because the Airport has permitted general aviation to use the airfield without paying the landing fee, it is unreasonable or unjustly discriminatory to impose the landing fee on the Airlines. Airlines' Brief, pp. 37-40.[22] Initially, it should be noted that, as found by the District Court, it is undisputed that the Airport has not shifted to the Airlines any of the costs of the use of the airfield by general aviation to cover the shortfall in general aviation costs. Pet. App. 38a. These costs have been recouped from nonairline users of the Airport. *Id.* Consequently, even if the Airport were required to make general aviation pay its full share of the airfield costs, the Airlines would not benefit because the costs of providing the airfield to them would be unaffected.

Moreover, since commercial air carriers and general aviation operators are completely different classes of user

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[22] These general aviation users, however, make other payments to the Airport to help defray the cost of using the Airport's facilities, including fuel flowage fees and hangar rentals. Pet. App. 29a. Such general aviation "fuel flowage" fees are common. Congressional Budget Office study entitled "Financing U.S. Airports in the 1980's" at p. 29 (April, 1984). The AAIA also specifically refers to and sanctions "local taxes on aviation fuel." 49 U.S.C. App. § 2210(a)(12).

who do not compete with each other, any failure to recoup the full costs of use of the airfield by general aviation does not unjustly discriminate against the Airlines.

The dormant Commerce Clause "prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988). *Accord, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 527 (1935). No question is raised under the Commerce Clause, however, when a state treats non-competitors differently for purposes of taxation or regulation. For example, in *Alaska v. Arctic Maid*, 366 U.S. 199, 204 (1961), this court held that since "freezer ships" bringing salmon to out-of-state canners "do not compete with those who freeze fish for the retail market," as distinguished from those taking their catch to Alaskan canners, Alaska's decision to levy taxes on the first category but not on the second did not implicate the Commerce Clause. The Airlines have offered no argument that the AHTA imposes a different standard of unjust discrimination, and there is nothing in its language or in its legislative history to suggest that it does.

In this case, any differential treatment as between commercial air carriers and general aviation is immaterial because they are not the same category of user and are not economic competitors. The District Court made a finding of fact, which the Sixth Circuit adopted, that "[g]eneral aviation aircraft are corporate aircraft and privately owned aircraft that are not in commercial, passenger, cargo or military service." Pet. App. 25a; J.A. 17.

In contrast, as the Court of Appeals noted, the Airlines "are engaged in 'the carriage by aircraft of persons or property as a common carrier for compensation or hire . . . ' " (quoting 49 U.S.C. App. § 1301(24)). J.A. 28. These findings demonstrate that general aviation does not compete with commercial air carriers and, accordingly, can validly be treated differently under both the Commerce Clause and the federal aviation statutes.[23]

Indeed, in *Evansville* this Court made it clear that a state may constitutionally impose an airport user fee on commercial air carriers or their passengers without imposing the same fee on "noncommercial flights." 405 U.S. at 717-19. More specifically, this Court held that airport charges imposed on each passenger boarding a scheduled commercial airliner, but not imposed upon "passengers on noncommercial flights" reflected a rational distinction between different classes of airport users and thus did not violate the Commerce Clause.

Even though the Airport does not collect from general aviation users the full costs associated with their use of the airfield, the fees charged the Airlines are not unreasonable since the Airlines do not pay the Airport for any shortfall in general aviation payments. The charges are not discriminatory because airlines do not compete with general aviation operators.

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[23] The AAIA makes it clear that it is only discriminatory or differential treatment of types of air services which are of the same class that is prohibited by the aviation statutes. *See*, 49 U.S.C. App. § 2210(a)(1)(A) and (B).

3. The Airport Surplus is Consistent with Federal Law

The Airlines argue that they should pay less than the Airport's actual costs of providing the aeronautical facilities they use because the Airport is able to accumulate surplus revenues from its nonaeronautical concessionaires. Airlines' Brief at 40. The Courts below correctly rejected such argument since the Airport has not generated any of its "surplus revenues" from the rates paid by the Airlines. The Airlines thus have not been harmed by the Airport's accumulation of surplus from concession revenues.

The Airlines also continue to argue (Airlines' Brief at 27-28) without any evidentiary support that the Airport has a surplus so far in excess of any possible future needs that somehow this surplus renders the Airline charges unreasonable.[24] The Airlines completely ignore the fact that the Airport's anticipated capital needs in the ten year period from 1990 to 2000 total more than $40,000,000.00

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[24] No Airline witness, qualified by actual airport or FAA experience, testified in support of the Airlines' surplus contentions. Nor was it shown that the surplus violated any statute or FAA rule or regulation. The Airlines unsuccessfully attempt to bolster their argument by taking out of context the "earthquake" comment in the testimony of Airport economist expert witness Ferdinand Levy. Reference to the California earthquake that had occurred only weeks before at the deposition location of Charles T. Horngren (and also immediately before the Ferdinand Levy deposition) was never meant to suggest that this airport in Michigan was retaining earnings in anticipation of an earthquake. J.A. 190.

for projects eligible for partial federal funding. Additionally, the Airport anticipates $11,000,000.00 in capital projects which are ineligible for any federal aid.

In 1990, Congress recognized that there was a critical need for additional capital development at U.S. airports beyond that which can be funded by surpluses from concession revenues and by federal aid. In the Aviation Safety and Capacity Expansion Act of 1990, Congress amended the AHTA to permit airports, with the approval of the Secretary of Transportation, to institute a Passenger Facility Charge (PFC) of $1, $2 or $3 per enplaning passenger to help defray the cost of airport development programs. Pub. L. No. 101-508, Tit. IX, 104 Stat. 1388 (1990), 49 U.S.C. App. § 1513(e). Congress approved these new PFCs at the nation's airports because it understood that "every airport in this country has unmet needs. It is estimated that nationwide we have $10 billion of need each year for the next 10 years." 136 Cong. Rec. H6298-304. The Airport applied for and in September 1992 received approval from the Secretary to institute a PFC to help pay for the significant extending and widening of a commercial airline crosswind runway (and related facilities), including necessary land acquisition. 57 Fed. Reg. 49,109 (1992). The total cost of the project is approximately $46,000,000.00 of which approximately $12,500,000.00 will come from PFC funds. The remaining $33,500,000.00 balance of the project will be paid for by a combination of federal aid, state funds and Airport-generated funds.

Based on capital needs in the next ten years of over $50,000,000.00 and the uncertainty of future federal aid, the Airport's $9,000,000.00 surplus at the time of trial reflects "prudent management" as acknowledged by the

District Court, rather than an unlawful excess as claimed by the Airlines. Pet. App. 39a. Under the AAIA and related grant assurances, the Airport surplus can only be used for Airport purposes. 49 U.S.C. App. § 2210(a)(12). The AAIA does not restrict airports from accumulating surpluses but rather encourages airports to do so, since airports are required to have a rate structure that allows them to be as self-sufficient as possible. 49 U.S.C. App. § 2210(a)(9).[25] Here it is uncontested that all Airport revenues have been used for Airport purposes. In fact, Kent County has never even been reimbursed for its $5,500,000.00 investment in the Airport. J.A. 129-30.

The Airlines also argue that the Airport's compensatory method is prohibited under both the AHTA and the Commerce Clause because in allocating its costs among users, the Airport does not take into account the *benefits* that the airfield and terminal provide to concessionaires and the resulting revenues the Airport derives from concessionaires. Airlines' Brief, pp. 23-26.[26] Initially, it

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[25] Even if the Airport were compelled to lower its charges to its concessionaires because such charges were found to be excessive and unlawful (as Thrifty Rent-a-Car, as *amicus curiae*, urges at p. 5), the Airlines would not benefit, because the costs of providing the airfield and terminal to them would not be reduced. The Airlines, however, are not protesting that the Airport's revenues are excessive because its concession rates are too high. Instead, the Airlines are seeking to receive concession revenues through a reduction in their own fees. The interests of the Airlines are thus adverse to the interests of the concessionaires, including Thrifty Rent-a-Car, which seeks a decrease in concessionaire charges.

[26] During the course of this action, the Airlines have shifted their arguments but not their objective. Sometimes the Airlines have argued that the Airport should be required to "cross-credit" concession revenues against the airfield and terminal costs that are borne by the Airlines. At other times, the Airlines have argued that the Airport should recognize the benefits derived by the concessionaires by allocating to the concessionaires some of the costs of the airfield and terminal space that the Airlines use. Whatever argument is used by the Airlines, the result the Airlines seek has always been the same: to force the Airport to accept from the Airlines *less than the actual costs* of providing the Airlines with the facilities they use.

should be noted that this argument is apparently based upon the erroneous *assumption* that the Airlines have "created the Airport's passenger flow"[27] and, therefore, are somehow entitled as a matter of federal law to any concession revenue that exceeds the Airport's actual costs. More importantly, however, this argument has no support in the precedents of this Court under the Commerce Clause or in the language of the AHTA.

In essence the Airlines' claim is that both the AHTA and the Commerce Clause dictate the use of a residual cost rate-making method that would credit concession revenues to the Airlines and thereby reduce their

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[27] The Airlines are not, in fact or in economic theory, responsible for the passenger flow at the airport. J.A. 158-61, 184-86 and 191-92. Rather, as shown by the testimony of the Airport's expert witnesses Brown and Levy, the demand for travel by business persons, by vacation travelers, by family visitors, and by government and military personnel to and from the metropolitan and regional Grand Rapids area creates the passenger flow through the terminal and its immediate environs. The community population and business base, not the Airlines, are responsible for the "derived demand" for air travel. J.A. 184-86.

charges.[28] No court has ever recognized such a right under the Commerce Clause and the *only* decision that has sustained such a claim by the Airlines under the AHTA is *Indianapolis*. There, a divided panel of the Seventh Circuit held that in view of the locational monopoly of the Indianapolis Airport and the fact that, with rare exception, airline passengers are the users of airport concessions, it was a violation of the AHTA for the Indianapolis Airport to ignore airport concession revenues in setting airline fees and charges. 733 F.2d at 1266-68. In this regard, the Seventh Circuit's decision in *Indianapolis* has never been followed by any other court nor accepted by the Secretary of Transportation as a correct statement of law.

Initially it should be noted that the decision in *Indianapolis* is distinguishable, since, as pointed out by both courts below, the Airport does not have a locational monopoly and the people who use concessions at the Airport include nonairline passengers. Pet. App. 33a; J.A.

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[28] The Airlines completely ignore the fact that residual cost rate-making requires special voluntary agreements between an airport and the airlines which detail how risks, revenues and management will be shared. In such residual cost agreements the Airlines, in exchange for guaranteeing the solvency of the airport, customarily control their airport financial risks by requiring "majority in interest" (MII) clauses which require that a majority of the airlines agree to the amount and type of major airport capital improvements. J.A. 40-42 and 46-47. Every suggested airport rate methodology offered at trial by the Airlines to replace the Airport's historic compensatory methodology was a form of "residual" methodology, confirming the Airlines' efforts to impose a residual cost methodology upon the Airport. J.A. 85.

24. More importantly, however, the decision in *Indianapolis* was wrong, and this Court should reject its rationale.

First, the *Indianapolis* court completely overlooked the preeminent regulatory authority of the Secretary of Transportation and improperly placed itself in the role of a regulatory agency. The assumption of the court in *Indianapolis* that "[n]o agency has regulatory authority over the rate practices of the Indianapolis Airport Authority," (733 F.2d at 1268) completely ignores the fact that from as early as the Federal Airport Act of 1946, and continuing down through the present time with the Airport and Airway Improvement Act of 1982, the Secretary of Transportation has been continuously delegated responsibility by Congress to insure that commercial airports are "available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. App. § 2210(a)(1). Thus, the whole premise of the *Indianapolis* decision, that there is a regulatory vacuum, is wrong. In respectfully declining to follow *Indianapolis*, the court in *City and County of Denver v. Continental Airlines, Inc.*, 712 F. Supp. 834, 839 (D.Colo. 1989), correctly observed that "nothing in the history and purpose of the Anti-Head Tax Act indicates that Congress intended the courts to act as a public utility commission and intervene in the setting of airport rates and charges through the adoption or rejection of any particular type of cost accounting methodology."

Second, the *Indianapolis* Court ignored the fact that the AHTA, by its plain terms, does not apply to concession revenues. The only user fees referred to in § 1513(b) are "reasonable rental charges, landing fees, and other

service charges from *aircraft operators* for the use of airport facilities." 49 U.S.C. App. § 1513(b) (emphasis supplied). The concurring opinion in *Indianapolis*, in rejecting reliance on the AHTA, correctly observed that

> . . . 1513(b) clearly applies only to fees charged to "aircraft operators." It does not apply to fees assigned to concessionaires. The majority opinion thus has expanded the reach of the statute and created regulation of the system where Congress clearly had no intention to regulate. 733 F.2d at 1274.

Similarly, the court in *Denver* and both courts below correctly held that concession revenues are not within the scope of the AHTA. Additionally, the Court below, quoting from the decision in *Denver*, illustrated the erroneous nature of the finding in *Indianapolis* that there is no material difference between charges for aeronautical services and charges for concessions. The critical difference, as noted by the Court below, is that passengers *must* make "use of the airport's runways, taxiways and airline portions of the terminal area," but a passenger *is not* required to make use of concessions. In other words, unlike the use of aeronautical services where "the air passenger is captive and her purse is necessarily and directly affected by . . . [airport] charges to the airlines[,]" the use of concessions is determined by "individual decisions driven by individual perceptions of need and economic values." J.A. 24 (quoting *Denver*, 712 F. Supp. at 838-39).

The Airlines argue, however, that even if the AHTA does not regulate concession charges, it nevertheless requires that the Airport allocate to the concessionaires some of the costs of the airfield and terminal space only

the Airlines use because, the Airlines say, the concessionaires "benefit" from these facilities. The Airlines do not suggest, however, that their *own* charges for the use of the airfield and terminal should reflect the benefits (*e.g.*, locally generated ticket revenues) the Airlines *themselves* derive from the Airport and local community.[29] Moreover, in making this argument the Airlines distort this Court's holding in *Evansville*. *Evansville* speaks in terms of charges not being "excessive in comparison with the government benefit conferred." *Evansville* does not suggest that Airline charges must be reduced to reflect "government benefits conferred" *on some other user*.

The Court of Appeals for the First Circuit appears to be the only other court that has spoken on the question of "benefits-based" airport rate-setting under the *Evansville* standard. In *American Airlines, Inc. v. Massachusetts Port Auth.*, 560 F.2d 1036, 1038-39 (1st Cir. 1977), unlike here, the issue was whether the Airlines could be charged for airport capital expenditures, as to which the Airlines claimed to receive no benefit. Even in that context, the First Circuit Court of Appeals rejected the Airlines' argument, holding that "the overwhelming thrust" of *Evansville* is to compare the charges with the airport's *costs*. *Id.*

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[29] If the Airlines were charged based upon their "benefits" instead of the Airport's actual costs, Airline charges would be substantially more. As found by the District Court the totality of all types of the earlier Airport's 1986 and 1987 charges to the Airlines represented only 1.2% of the Airline ticket revenues generated by flying in and out of the Airport. Pet. App. 37a. The totality of the challenged user fees, if applied for all of 1988, represented only 1.5% of the 1988 Airline ticket revenues generated by using the Airport. Pet. App. 37a.

The First Circuit then questioned whether a benefits measure would make any sense:

> [W]e cannot see how a federal system, recognizing state sovereignty, could work on a basis of customer judgments of benefits received. . . . If such taxes as landing fees were to be subject to attack from each user, depending upon the particular utility, their imposition could be a matter of endless and shifting controversy. Such an approach would subject every taxing authority to the judgments of courts as to the wisdom, the foresight, and the efficiency of its plans from the viewpoint of each affected customer.
>
> Not only would the airports be subject to uncertainty, in effect having to aim their tax plans at a moving target, but the courts would find themselves involved in long trials attempting to adjudicate the quantum of benefit received by an airline, the normative ratio between benefit and tax, and the amount of reasonable cost which could be properly allocated to the users. We do not think that states are held to such a punctilio of proof. *Id.*

In fact, the Airlines have never offered a coherent statement of how to apply the "benefit" method they claim is required.

Finally, it defies common sense to hold, as did the court in *Indianapolis*, that Congress, by its use of the term "reasonable" in AHTA, intended to *sub silentio* overrule the use of compensatory rate-making. The undisputed record here is that the Airport was utilizing compensatory rate-making at least as early as 1969, four years

before the AHTA was enacted. Compensatory rate-making is used by many other airports around the country.[30]

For all of the above reasons, the Airlines' invitation for this Court to embrace *Indianapolis* is misplaced. *Indianapolis* wrongly placed the court in the role of a public utility commission based on the patently erroneous premise that no federal agency has jurisdiction over airport rates and charges. Then, wrongly acting as a public utility ratemaker, the *Indianapolis* court ignored the fact that the AHTA by its own terms does not apply to concession revenues. Further, the *Indianapolis* court blurred a critical difference between airport-supplied aeronautical facilities which the passenger must use and concession facilities whose use is discretionary. Finally, it expanded the meaning of the word "reasonable" beyond any plausible interpretation to hold that the AHTA's reference to "reasonable rental charges [and] landing fees" precludes cost-based rate-making which was well established before the AHTA was enacted.

In short, *Indianapolis* is an aberrant decision which, not surprisingly, has not been followed by any other court and whose erroneous reasoning should be squarely rejected by this Court.

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[30] The 1984 Congressional Budget Office Study on U.S. Airport Financing found that 42% of the nation's large and medium sized airports then utilized compensatory rate-making.

CONCLUSION

For all of these reasons, this Court should affirm the lower court judgment to the extent it has been appealed by the Airlines.

Respectfully submitted,

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